

AL-MAJALLA AL AHKAM AL ADALIYYAH (The Ottoman Courts Manual (Hanafi))

INTRODUCTION.

Part I Definition and Classification of Islamic Jurisprudence

- 1. The science of Islamic jurisprudence consists of a knowledge of the precepts of the Divine Legislator in their relation to human affairs.

The questions of Islamic jurisprudence either concern the next world, being known as rules relating to worship, or to this world, being divided into sections dealing with domestic relations, civil obligations and punishments. Thus Allah decreed the continuation of the world until the appointed time. This, however, can only occur by mankind being perpetuated which is dependent upon marriage of male and female with a view to procreation. Moreover, the continuation of the human species is assured by individuals association together. Man, however, is view of the weakness of his nature is dependent upon food, clothing, housing and the industries for his subsistence. In other words, in view of the fact that man is a civilised being, he cannot live in solitude like the other animals, but is in need of co-operation and association in work with his fellow men in order to live in a state of civilisation. Every person, however, asks for the things which he likes and avoids things which are disagreeable to him. As a result, it has been necessary to establish laws of a nature likely to maintain order and justice as regards marriage, mutual help and social relations, which are the basis of all civilisation.

The first division of Islamic jurisprudence is the section dealing with domestic relations. The second is the section dealing with civil obligations. In view of the fact that the continuance of civilisation on this basis necessitates the drawing up of certain matters relating to punishments, the third section of Islamic jurisprudence deals with punishments.

As regards the section dealing with civil obligations, the questions which are of the most frequent occurrence have been collected together from reliable works and set out in this Code in the form of Books. These Books have been divided into Chapters and the Chapters into Sections. The questions of detail which will be applied in the courts are those questions which are set out in the following Chapters and Sections. Islamic jurists, however, have grouped questions of Islamic jurisprudence under certain general rules, each one of which embraces a large number of questions and which, in the treatises on Islamic jurisprudence, are taken as justification to prove these questions. The preliminary study of these rules facilitates the comprehension of the questions and serves to fix them in the mind. Consequently, ninety nine rules of Islamic jurisprudence have been collected together as follows, before commencing on the main work and form part II.

Although a few of them, taken alone, admit of certain exceptions their general application is in no way invalidated thereby, since they are closely interrelated.

PART II. MAXIMS OF ISLAMIC JURISPRUDENCE.

- 2. A matter is determined according to intention; that is to say, the effect to be given to any particular transaction must conform to the object of such transaction.
- 3. In contracts effect is given to intention and meaning and not to words and phrases. Consequently, a contract for sale subject to a right of redemption has the force of a pledge.
- 4. Certainty is not dispelled by doubt.
- 5. It is a fundamental principle that a thing shall remain as it was originally.
- 6. Things which have been in existence from time immemorial shall be left as they were.
- 7. Injury cannot exist from time immemorial.
- 8. Freedom from liability is a fundamental principle. Therefore, if one person destroys the property of another, and a dispute arises as to the amount thereof, the statement of the person causing such destruction shall be heard, and the onus of the proof as to any amount in excess thereof is upon the owner of such property.
- 9. Non-existence is a fundamental principle which applies to all rights which may subsequently accrue. Example:- In a case of partnership of capital and labour, a dispute arises as to whether profit has been made or not. The statement of the person supplying the labour is heard, and the owner of the capital must prove that profit has in fact been made, since the fundamental principle is the non-existence of the profit.
- 10. Judgement shall be given in respect to any matter which has been proved at any particular time, unless the contrary is proved.

Consequently, if it is proved at any particular time that a particular thing is owned by a particular person in absolute ownership, the ownership thereof shall be held to be valid unless circumstances arise which invalidate such ownership.

- 11. It is a fundamental principle that any new occurrence shall be regarded as happening at the time nearest to the present. That is to say, if a dispute arises regarding the cause of some new event and the time at which it occurred, such event shall be considered with reference to the time nearest to the present, unless it is proved that it relates to some remoter period.
- 12. It is a fundamental principle that words shall be construed literally.
- 13. No attention shall be paid to inferences in the face of obvious facts.
- 14. Where the text is clear, there is no room for interpretation.
- 15. A matter which has been proved contrary to legal analogy cannot be cited by way of analogy in respect to any other matter.
- 16. One legal interpretation does not destroy another.

- 17. Difficulty begets facility; that is to say, difficulty is the cause of facility and in time of hardship consideration must be shown. Very many subjects of Islamic jurisprudence, such as loans, transfer of debts and interdiction are derived from this principle, and the latitude and indulgence shown by Islamic jurists in their rulings are all based upon this rule.
- 18. Latitude should be afforded in the case of difficulty, that is to say, upon the appearance of hardship in any particular matter, latitude and indulgence must be shown.
- 19. Injury may not be met by injury.
- 20. Injury is removed.
- 21. Necessity renders prohibited things permissible
- 22. Necessity is estimated by the extent thereof.
- 23. A thing which is permissible by reason of the existence of some excuse thereof, ceases to be permissible with the disappearance of that excuse.
- 24. When a prohibition is removed, the thing to which such prohibition attaches reverts to its former status of legality.
- 25. An injury cannot be removed by the commission of a similar injury.
- 26. A private injury is tolerated in order to ward off a public injury. The prohibition from practice of an incompetent physician is derived from this principle.
- 27. Severe injury is removed by lesser injury.
- 28. In the presence of two evils, the greater is avoided by the commission of the lesser.
- 29. The lesser of the two evils is preferred.
- 30. Repelling an evil is preferable to securing a benefit.
- 31. Injury is removed as far as possible.
- 32. Any want, whether of a public or private nature, is so dealt with as to meet the exigencies of the case. The validity of sale subject to a right of redemption is of this nature. The inhabitants of Bokhara having fallen badly into debt, this procedure was put into operation in order to meet the exigencies of the case.
- 33. Necessity does not invalidate the right of another. Consequently, if a hungry person eats bread belonging to another, such person must later pay the value thereof.
- 34. A thing which may not be taken may also not be given.
- 35. It is forbidden to request the performance of a prohibited act.
- 36. Custom is an arbitrator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgement.

- 37. Public usage is conclusive evidence and action must be taken in accordance therewith.
- 38. A thing which it is customary to regard as impossible is considered to be impossible in fact.
- 39. It is an accepted fact that the terms of law vary with the change in the times.
- 40. In the presence of custom no regard is paid to the literal meaning of a thing.
- 41. Effect is only given to custom where it is of regular occurrence or when universally prevailing.
- 42. Effect is given to what is of common occurrence; not to what happens infrequently.
- 43. A matter recognised by custom is regarded as though it were a contractual obligation.
- 44. A matter recognised by merchants is regarded as being a contractual obligation between them.
- 45. A matter established by custom is like a matter established by law.
- 46. When prohibition and necessity conflict, preference is given to the prohibition.

Consequently, a person may not sell to another a thing which he has given to his creditor as security for debt.

- 47. An accessory which is attached to an object in fact is also attached to it is law. Consequently, when a pregnant animal is sold, the young in its womb is sold with it.
- 48. An accessory to an object cannot be dealt with separately.yvT A Example: The young in an animal's womb cannot be sold separately.
- 49. The owner of a thing held in absolute ownership is also the owner of the things indispensable to the enjoyment of such thing.yvT K Example: A person who buys a house is also owner of the road leading to it.
- 50. If the principle fails, the accessory also fails.
- 51. A thing which fails is not restored; that is to say, that which goes does not return.
- 52. When a thing becomes void, the thing contained in it also becomes void.
- 53. When the original undertaking cannot be carried out, the equivalent thereof is carried out.
- 54. A thing which is not permissible in itself, may be permissible as an accessory. Example:- It is not permissible for purchaser to make the vendor his agent to receive the thing sold; but if he gives a sack to the vendor to measure and put therein the provisions which he has brought and the vendor puts the provisions into the sack, the purchaser thereby receives them impliedly and as an accessory.
- 55. A thing which is not permissible at the outset may become permissible at some later period. Example:- The disposal of a share of undivided jointly owned property by

way of gift is invalid, but if a person entitled to a share of undivided jointly owned property which has been bestowed by way of gift appears and takes possession thereof, the gift does not become the property of the recipient of the gift.

- 56. Continuance is easier than commencement.
- 57. A gift becomes absolute only when delivery thereof is taken. Example:- A person bestows a thing upon another person by way of gift. Such gift is not binding until delivery thereof has been taken.
- 58. The exercise of control over subjects is dependent upon the public welfare.
- 59. Private guardianship is more effective than public guardianship. Example:- The guardianship exercised by the trustee of a pious foundation is more effective than the guardianship of the court.
- 60. A word should be construed as having some meaning, rather than passed over in silence. That is to say, if any particular meaning can be attributed to a word, it may not be passed over as devoid of meaning.
- 61. When the literal meaning cannot be applied, the metaphorical sense may be used.
- 62. If no meaning can be attached to a word it is disregarded altogether. That is to say, if a word cannot be construed in either a literal or metaphorical sense it is passed over in silence as being devoid of meaning.
- 63. A reference to part of an indivisible thing is regarded as a reference to the whole.
- 64. The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the text of the law or by implication.
- 65. A description with reference to a thing present is of no effect, but the contrary is the case if such thing is not present. Example:- When a vendor who is about to sell a grey horse, such grey horse being present at the meeting where the sale took place, states that he is selling a brown horse for so many thousand piastres, his offer is held to be good and the word brown is of no effect. But if he sells a grey horse which is not present and he describes it as brown, the description is held to be good but the sale is not concluded.
- 66. A question is considered to have been repeated in the answer. That is to say, in the event of a question being answered in the affirmative, the person answering the question is considered to have repeated the question.
- 67. No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is an absolute necessity for speech. That is to say, it may not be said that a person who keeps silence has made such and such a statement, but if he keeps silence where he ought to have made a statement, such silence is regarded as an admission and statement.
- 68. In obscure matters the proof of a thing stands in the place of such thing. That is to say, obscure matters concerning which it is hard to discover the truth are judged according to the obvious proof concerning them.
- 69. Correspondence takes the place of an exchange of conversation.

- 70. The sign of a dumb person which are generally recognised take the place of a statement by word of mouth.
- 71. The word of an interpreter is accepted in every respect.
- 72. No validity is attached to conjecture which is obviously tainted by error.
- 73. Probability, even though based upon evidence, is not proof. Example:- If a person admits while suffering from mortal sickness that he owes a certain sum of money to one of his heirs, such admission is not a proof unless confirmed by the other heirs, since the probability of such person defrauding the other heirs of their property is based upon the mortal sickness. If the statement, however, is made while in a state of good health, such admission is considered to be valid. The probability is that case is mere supposition and consequently there is no objection to the validity of the admission.
- 74. No weight is attached to mere supposition.
- 75. A thing established by proof is equivalent to a thing established by ocular inspection.
- 76. EVIDENCE IS FOR HIM WHO AFFIRMS; THE OATH FOR HIM WHO DENIES.
- 77. The object of evidence is to prove what is contrary to appearance; the object of the oath is to ensure the continuance of the original state.
- 78. Evidence is proof affecting third person; admission is proof affecting the person making such admission only.
- 79. A person is bound by his own admission.
- 80. Contradiction and proof are incompatible; but this does not invalidate a judgement given against the person contradicting. Example:- Witnesses contradict themselves by going back upon the evidence they have given. Such evidence is not proof; but if the court has already given judgement based upon the original evidence, such judgement may not be set aside, but the witnesses must pay the value of the subject matter of the judgement to the persons against whom judgement has been given.
- 81. Failure to establish the principle claim does not imply failure to establish a claim subsidiary thereto. Example:- A person states that A owes a sum of money to B and that he has the surety of A. Such person will be obliged to pay the sum in question if A repudiates the debt and B demands payment.
- 82. If the validity of a condition is established, the validity of anything dependent thereon must also be established.
- 83. A condition must be observed as far as possible.
- 84. Any promise dependent upon a condition is irrevocable upon such condition being fulfilled. Example:- A person tells A to sell a certain thing to B and informs A he will pay him in the event of B failing to do so, and B does in fact fail so to do. The person making the promise is obliged to pay the money.
- 85. The enjoyment of a thing is the compensating factor for any liability attaching thereto; that is to say, in the event of a thing being destroyed, the person to whom

such thing belongs must suffer the loss and conversely may enjoy any advantages attaching thereto. Example:- An animal is returned by reason of an option for defect. The vendor may not charge any fee on account of the use of the animal, because if it had been fallen upon the purchaser.

- 86. Remuneration and liability to make good loss do not run together.
 - 87. Disadvantage is an obligation accompanying enjoyment. That is to say, a person who enjoys a thing must submit to the disadvantages attaching thereto.
 - 88. The burden is in proportion to the benefit and the benefit to the burden.
 - 89. The responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such act to be performed, provided that such person does not compel the commission thereof.
 - 90. If a person performs any act personally and is implicated therein with the person who is the cause thereof, the person performing such act is responsible thereof. Example:- A digs a well in the public highway and B causes C's animal to fall therein and to be destroyed. B is responsible thereof and no liability rests with the person who dug the well.
 - 91. An act allowed by law cannot be made the subject of a claim to compensation. Example:- An animal belonging to A falls into a well which B has dug on his own property held in absolute ownership and such animal is destroyed. No compensation can be claimed.
 - 92. A person who performs an act, even though not intentionally, is liable to make good any loss caused thereby.
 - 93. A person who is the cause of an act being performed is not liable to make good any loss caused by such act unless he has acted intentionally.
 - 94. No liability attaches in connection with offences of or damage caused by animals of their own accord.
 - 95. Any order given for dealing with the property of any other person held in absolute ownership is void.
 - 96. No person may deal with the property of another held in absolute ownership without such person's permission.
 - 97. No person may take another person's property without some legal reason.
 - 98. Any change is the cause of the ownership of a thing held in absolute ownership is equivalent to a change in that thing itself.
 - 99. Any person who hastens the accomplishment of a thing before its due time, is punished by being deprived thereof.
 - 100. If any person seeks to disavow any act performed by himself, such attempt is entirely disregarded.
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